

Critical Legal Studies

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I always find it difficult to talk in a general way about Critical Legal Studies (CLS) because although, as David says, its core membership is a pretty homogeneous group in some ways—they are mostly law teachers between 33 and 45, similar in intellectual and political formation, and they get together every year—their intellectual practices turn out actually to be quite miscellaneous. And this is for the very good reason that CLS is at bottom a kind of local politics. Despite a considerable commonality of concerns, its members (with rare exceptions such as Roberto Unger) have not tried to work out any body of ideas systematically. Most of its work is better described as a series of guerrilla attacks on extremely local targets—on particular impacted clusters of political-intellectual-cultural practices that produce and reproduce, in specific contexts, "false necessity"—the sense people have that the way things are is, with very little scope for variation, the way they must continue to be.

In that way, of course, CLS's work is related to the much more ambitious projects of the neo-Marxist sociology of law addressed to the problems of "legitimation" or "hegemony" in advanced capitalist societies—or more generally to the role of ideology in producing shared senses of social reality and of the seemingly "natural" hierarchies in civil society. You could think of CLS as a bunch of

localized critiques directed against some very specific established doctrines, practices, and assumptions of the places where most of us happen to find ourselves—in law schools. Of course, by practicing our critical method on local practices, we're also trying to teach ourselves and others to transfer the critical method to other types of similar impacted fields elsewhere in the society, to generate what you might call "discourses of resistance" in opposition to "discourses of necessity"—the assumption being, of course, that the methods are transferable because discourses of necessity don't vary all that much in their structure from context to context (though they may vary greatly in their particular content). Arguments for the necessity of hierarchy, for instance—that it's efficient, natural, historically sanctioned, freely consented-to, better here than in Russia, and the rest—are much the same everywhere.

While engaged in our local projects—chiefly, criticizing the discourses of legal mandarins—CLS people affiliate themselves as Peter Irons does with the Legal Realists. We see ourselves in a sense as carrying forward the Realists' program of debunking formalism in legal reasoning (or, more generally, in the structuration and the justification of legal institutions and practices). We see the Realists, who are usually critized for having "gone too far," as actually not having gone far enough, as having retreated from their program of critique before they generalized the critique from the particular formalism they were attacking—19th century "classical" legal thought—to the structure of liberal-legal thought generally. The Realists believed, for example, as modern law-and-economics folks tend to believe, that the integrity of the liberal-legal scheme could be reconstituted, once its formalist foundations had been blasted away, as a kind of utilitarian policy science. One of the aims of CLS has been to try to show that the structures of modern legal-policy arguments are at bottom quite similar to those of the discredited formal-doctrinal arguments, and thus vulnerable to the same critiques.

In summary, then, CLS has developed a little collection of rhetorics and analytic moves designed to cope with some very local and specific problems. These moves have mostly developed out of dialogues and arguments not with other people on the left, but with liberals in the legal-intellectual mainstream. A good deal of the published CLS work has been concerned with criticizing mainstream scholarship on legal doctrine. Why is that? I can assure you it's not because, as some folks have attributed to us, we think appellate-case doctrine is the mainspring, or the keystone in the arch of advanced capitalist society, so that if somehow we could just perfect the critique of offer-and-acceptance, BINGO!—the hierarchies of class, race, and gender would dissolve overnight and we would all be linked together in societies of loving communion. That's not actually what we think. We spend time criticizing legal-doctrinal writing because we are in law schools where that is one of the principal forms of

discourse; deconstructing legal doctrine is simply part of the strategy of trying to match a discourse of resistance to the local discourse of constraint—the discourse that seems to lock us into a finite set of imaginable alternatives—wherever one happens to find oneself. I do believe that in the process of critique, one begins to catch on to the linkages between superficially unrelated discourses of constraint—the offer-and-acceptance doctrine, for instance, is a strand in a common web of constraint with countless other ways in which people think about security and freedom in social life. Ideally, the little project of local deconstruction should give one the power that comes from experience to try out similar projects elsewhere.

This peculiar agenda, I realize and to some extent regret, has created the characteristics of CLS work that make it so irritating for other left-intellectual groups to deal with: our law school parochialism, our seemingly absurd obsession with relatively marginal matters of legal doctrine, our theoretical eclecticism and general refusal (again with some exceptions such as Unger's work) to try to systematize anything, indeed our juvenile guerrilla-yippie thumb-nosing at systems of most kinds; and, above all, our persistent refusal to try to engage in what might be called intellectual cartography, to locate where we fit on the world map of leftist discourses about law and the state (West of Althusser, South-East of Habermas, and Due North of Foucault). It's not as if people in CLS haven't talked about these issues—they talk about them all the time—but I think most of us feel this almost desperate desire to avoid the terrible pathology of intellectual movements, especially leftist ones, which is that after an initial classic phase of development, they rapidly deteriorate first into baroque and then into roccoco: into an unbelievably abstract, self-referential, hermetically locked-in set of concerns, vocabularies, theoretical preoccupations, and factional polemics. It seems awfully important to continue to be engaged, in accessible language if possible, with the liberals who for the most part seem actually to run things in the context where we happen to be situated.

Well then, what has come out of this project of local critique? Some interesting work, I think—though people outside law and particularly outside law schools haven't found a whole lot of it as interesting and useful as they would have hoped, have often wished that it were something else. The best work perhaps has consisted of internal critiques of legal doctrine—both traditional doctrine and its principal modern variant, law-and-economics—which have tried to dig out the substructures of thought, the logical forms, epistemological premises, historical assumptions, conceptions of the self, and so forth, underlying liberal-legal consciousness. (My own work, for example, has mostly been directed at what I take to be a set of implicit though usually inarticulate assumptions, labeled "evolutionary functionalism," about how legal forms have developed in relation to general social and economic change in modern societies.) This kind of critique tends

to be given two sorts of emphases in CLS work. One is a traditional left emphasis that you might call ideological unmasking: you take a system of legal rules or practices that pretends to be neutral and even-handed, and simply show that in operation it has been differentially applied with a tilt favoring some interests over others. Some of the CLS work on labor law uses this approach. The other emphasis is on the indeterminacy rather than the bias of systems: it claims that the grounding assumptions are contradictory, so that even if conscientiously and even-handedly applied, they could never dictate any particular set of outcomes. The appearance emanating from legal fields that they can give more or clear reasons for how the law will treat people in particular situations derives from an unconscious privileging, in different contexts, of one pole of the contradiction over another. In contract law, for instance, every argument for fostering contractual freedom can be met with an opposing counter-argument in favor of the security of transactions. For that matter, every argument that freedom of contract requires legal nonintervention can be met with a counter-argument that, on the contrary, it requires active intervention. Resolution here can only come about through suppressing one set of claims or the other. CLS work of this kind concentrates on dredging up the suppressed alternatives and detailing the devices employed in their suppression.

The point of both kinds of critique, obviously, derives from the view that what we conceive of as the hard social reality of our situation is a socially constructed reality—constructed in part in our technocratic age by these rationalist discourses. The critique of discourse is an effort to thaw out the seeming rocky solidity of this reality by showing how frail and collapsible its structures are. The critique is one that emphasizes the historical and cultural contingency of all social arrangements, their transient, provisional, local and accidental character. When an apologist for the current order claims that what he thinks of as "private property" is absolutely necessary in a given context to freedom or efficiency as conceived somehow, you show that "private property" has actually referred to an incredibly diverse set of social practices, justified in all sorts of mutually inconsistent ways; that some kinds of "property," "freedom," or "efficiency" radically conflict with the kinds that the apologist arbitrarily wants to privilege; and that historically the causal connections that the apologist wants to draw between property (somehow defined) and liberty and efficiency (somehow defined) have in many situations worked out exactly the opposite way (e.g., liberty and efficiency have been increased through the destruction of property rights). You may end up by *agreeing* that in the context hypothesized it might indeed be best to recognize some kind of "private property" rights; but you might radically disagree about what that conclusion entailed. (You might, for example, promote the recognition of a generic property of workers in certain kinds of employment relations.)

Once you've gone through all the historical and theoretical options that the property concept makes available, you've made, I think, a small contribution towards promoting in the mind of anybody who is around to listen the possibility of a tiny interstitial assertion of freedom in that situation, a possibility of breaking out of the particular little iron cage that the rationalistic discourse, at that moment, is constructing around us. This has been I suppose the point of some of the most effective CLS work, the critiques of law-and-economics—of its core premises, of the Coase Theorem, and of cost-benefit analysis of legal entitlements—chiefly by means of relatively technical internal critique. Once absorbed, the critique empowers the listener to take on economists and policy analysts, and to say, "Look, this incredibly oppressive intimidating technocratic discourse you're using simply doesn't point in the inexorable way you claim it does to the policy conclusions you prefer." Either it contains a built-in bias (Critique-Type #1) such as the bias towards counting only measurable material kinds of satisfaction as social goods; or it simply arbitrarily suppresses premises of its own (Critique-Type #2), which on slightly-different-but-equally-if-not-more-plausible assumptions could point to precisely opposite policy conclusions (market failures requiring regulatory interventions are potentially omnipresent to the agile interpreter).

The core premise of this kind of critique is one that CLS people seem to share with Foucault's later work: that tyrannies over the mind and body are local in their particular configurations, though interlinked throughout society; that freedom comes to us therefore in small interstitial acts of resistance, which if learned and repeated elsewhere may spread throughout society. Illegitimate hierarchies, not only of class, but of race and gender, and not only of but within classes, races, and gender, seem to be pervasive everywhere: their particular forms differ, but their structures seem often to be fairly similar. It's as if all the manifold little cells of hierarchy were linked together by a similarity of structure, all helping to replicate each other through imitation and transferred experience. An attack—even an attack in the highly intellectualist form of picking apart rationalist justifications—on hierarchy in any local cell (even simply hierarchy *within* prosperous, professional, enclaves of the upper-middle-class) is potentially therefore a tiny event towards transformation of the whole. All of us, I hasten to say, are painfully aware of how conveniently self-serving such a social theory can be, how easily it could lead law professors to indulge in the fantasy of serving as the vanguard of profound social change without ever moving from their casebooks and cozy jobs; and none of us, surely, is so deluded as to suppose that rationalistic critique of a few mandarin texts and practices can ever make more than a modest contribution towards our liberation. But it's just as big an error to think it makes no difference. We are ruled more than we think by such texts and practices.

I experience this as I speak as a thoroughly unsatisfactory account because CLS is nothing if not local, concrete, and particular. One can only convey its real flavor by extended detailed illustration, and I've given almost no such examples in this entire talk, which for that reason represents a kind of betrayal of CLS people's determination not to speak this abstractly or generally about anything. Perhaps the best I can do is to urge those who have been put off by the parochial concerns of CLS work to look at it again on its own terms, as a kind of local critique, and then to see if it helps them at all to generalize its critiques to their own local situations.